

APPEAL NO. 030342
FILED MARCH 28, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 13, 2002. The only issue at the CCH was whether the decision of the independent review organization (IRO) is supported by a preponderance of the evidence. The hearing officer determined in Finding of Fact No. 8 that by May of 2002, the respondent (claimant) met the clinical criteria for a 360-degree fusion; and in Finding of Fact No. 14 that a 360-degree fusion and discography, as recommended by the claimant's orthopedic surgeon, are medically necessary for the treatment of the claimant's back. She further concluded in Conclusion of Law No. 3 that the IRO's decision is not supported by a preponderance of the evidence.

The appellant (carrier) urges reversal based on the grounds that the hearing officer did not give the IRO's decision the proper weight. The carrier also disputes Findings of Fact Nos. 8 and 14, and Conclusion of Law No. 3, urging that there is either no evidence to support such determinations, or alternatively, such determinations are against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given evidence. There is conflicting evidence with respect to the claimant's clinical necessity of surgery in this case. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. commercial insurance company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We find sufficient evidence to support the hearing officer's determination with respect to Finding of Fact Nos. 8 and 14 in this case.

In Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002, we decided that the hearing officer did not err in applying a preponderance of the evidence standard in determining that the IRO's decision was not supported by the evidence. The carrier takes issue with the principles announced in that case, arguing that the Appeals Panel is applying the wrong standard of review; we decline to revisit our recent decision in Appeal No. 021858-s. In this instance, the hearing officer pointed to the evidence from the orthopedic surgeon repeatedly

recommending surgery and indicating that the claimant met the clinical criteria for such procedures. The hearing officer also refers to a clinically significant MRI of the claimant's lumbar spine and two inconclusive medical reports, and determined that the preponderance of the evidence was contrary to the IRO's decision that the requested surgery was not medically necessary.

We will only reverse the hearing officer's determination if we find that it is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Our review of the record does not reveal that the hearing officer's determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Accordingly, we affirm the determination that the IRO decision is not supported by a preponderance of the evidence.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Chris Cowan
Appeals Judge